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# Past Caring About Passing

Saoirse Caitlin O'Shea

**ABSTRACT:** This is an essay concerned with sex, or more specifically my recent experiences of sex, sexual attraction and how they seem to help define me. As a story about sex it is (possibly) salacious and will reveal things about me that some may regard as private, better left unsaid and unsuitable in an academic essay. Except that I am not an academic and this is not an academic essay but a story of someone usually identified as a (transsexual) woman. Except I don't identify myself as a binary transsexual woman but as a non-binary assigned male at birth (AMAB) person. In writing about my sex life I want to ask a few questions about (my) gender, sexuality, identity and deception.

Sex, at least for me, can be risky in more ways than one. I'm anally receptive but sexual risk for me is not all about possible exposure to sexually transmitted diseases (STDs), it is also whether a sexual encounter might leave me as a victim of "trans panic": will the next person who fucks me perhaps beat me senseless before claiming I deceived them and they didn't know I was AMAB until it was too late? Am I at more risk, and also more deceptive, if a partner thinks I'm a cis-gender woman or a binary transsexual woman? Just where does the line between being "out and proud", passing and deception lie for me as a non-binary AMAB surviving in a largely binary world?

In this essay, I thus wish to explore how issues of sex and deception might interact and raise questions for me as a non-binary, AMAB person. In doing so I will attempt to interweave a critical analysis of some media stories of sexual deception with an autoethnographic account of sex. I am not wise enough to have answers to my questions, however, but instead hope that others may do so.

**KEYWORDS:** passing, misidentification, sex by deception, transsexual, non-binary.

**AUTHOR NOTE:** I'm a non-binary trans person physically "transitioning" and living in the North-East of England. I "came out" a number of years ago and subsequent-



ly lost family and home. Underemployed on a zero hour contract that pays so little, I now live in fuel poverty in subsidised social housing and eat food supplied by a food bank. But I am thankful that I am no longer homeless; aged 52 I spent six months through the Winter and Spring of 2015/16 rough sleeping. What I wake to is fear of eviction if I can't pay my rent – it forecloses my life to the extent that I fantasize about making myself homeless again just to escape that pervasive fear. After paying rent, council tax, electricity, water and outstanding debts I have less than £7 per week to live on. I was once an academic.

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## Past caring about passing

In this essay I wish to consider how the erotic sexual practices of some people may seem to braid with a popular trope of “passing” to suggest that transgender people<sup>1</sup> sometimes deceive cisgender people to have “sex by deception”. I will focus on the 2015 UK prosecution of Gayle Newland for “sex by deception” and how this and other recent prosecutions may affect transgender people. This is not an abstract issue for me, however, as I identify as non-binary AMAB and am currently in a process of medical transition. As such I will also reflect on autoethnographic examples to consider how “sex by deception” may affect me personally. I want to emphasise that this is very much a personal reflection and do not claim that it is generalizable to others under the transgender umbrella. Nonetheless, I hope my account may add to other voices concerned with how, to paraphrase Nancy Scheiman (1997), transgender lives lived may be made liveable.

I'll start with a brief explanation of autoethnography method and its relevance to this essay. I will then consider how passing and deception may condense with erotic sexual life both presumed and actual to form a dangerous amalgam that may leave some transgender people vulnerable to legal prosecutions for “sex by deception”. I will consider this particularly in relation to the 2015 criminal conviction of Gayle Newland for just such a crime. I end with a vignette of a recent sexual encounter of mine. This is not a traditional academic ending – I do not summarise and conclude my essay or demonstrate how well I have met my research aims and objectives. Instead, I merely ask some open questions as to what this encounter

may mean to me. I do not have answers to them but instead hope my story may resonate and perhaps provoke those interested in transmaterialities to answer.

## Autoethnography and why it is all about me

My twenty-year relationship ended in 2015 due to escalating transphobic abuse that I had experienced since coming out in 2010 became so bad and so frequent that I chose to make myself homeless. Aged 52, homeless, friendless, unemployed and penny-less in a city I did not know, I spent a cold Winter rough sleeping before I was finally identified as vulnerable enough to be offered social housing.

In mid-2016 with a roof over my head but struggling with poverty I was, and remain, both jobless and desperately lonely. I desired a new relationship and in all honesty, I also wanted to have sex again. In 2016 I also stumbled across the case of Gayle Newland and sex by deception in a Facebook discussion. It scared me – it still does – here I am looking for love and sex and there she was, criminalised for sex by deception. Will a sexual partner still love me tomorrow or will I be prosecuted in a court of law or be beaten shitless because of trans panic?

The essay is peppered with autoethnographic examples to illustrate, expand upon and at times question and contest issues raised in the text. Autoethnography, despite being an established research method, remains controversial and is often described by detractors as overly emotive, lacking in objectivity and little more than narcissistic writing (see for instance Wacquant, 2005). Following Contreras (2014) I however believe autoethnography offers the potential to provide a saturated, flesh and blood account of my “lived life”. Positioning myself as the subject of my own research “privileges the self-revelatory subject” (Coffey, 1999, p. 118) and allows me to draw on experiences and understandings that may not always be accessible to other forms of observational ethnographic research. Moreover, the form of autoethnography that I use here attempts to evoke both concrete experience and intimate detail (Ellis, 1999) in an emotive account that attempts to achieve emotional resonance (Anderson, 2006) with readers. I do not attempt to convince through rational argument supported by a weight of empirical evidence but rather hope my account is both believable and one readers may find some empathy with. I hope this offers empirical depth whilst also remaining mindful of the concerns of trans folk that some academics in the past used us as the object of

research without sufficient consideration of how those lives were affected: in writing of myself I expose only myself to a risk of moral opprobrium.

## Passing, deception and sex

It often seems that the trope of “passing”<sup>2</sup> is both gold standard and *bête noire* for trans-folk. Anecdotally passing often seems to serve as enquiry, comment, evaluation and judgemental gossip – “Do I pass?”, “She passes”, “Honey, you’ll never pass looking like that”. The presumption that trans folk need to pass has however been heavily criticised by and since Sandy Stone’s 1991 *Manifesto*. I am non-binary and part of my gender identity is based on my visible gender difference; I am neither, nor desire to be, male or female and do not wish to pass as either. But my gender and passing are not all about me, what I do and what I want, they are also about how other people might gender me and where Stone’s refusal of passing is perhaps complicated further because I have not and may yet refuse to “fully” transition to the specificity of a post-operative transsexual body (Halberstam, 1998; Snorton, 2009).

In my daily life most strangers assume I am a woman or a binary transwoman crossing from male to female. All of this despite what I say and how I present – T-shirt, skinny jeans, knee high Doc Martins, long hair, no make-up, breast curtesy of HRT and never tucked. Despite visible male and female cues contradicting each other – screaming, “I am not male and I am not female!” – and despite that passing is irrelevant to me, and, refusing to pass, I am still generally viewed either as a woman or as a transwoman who passes. I seem to fail Stone’s demand for a transgender visibility not built on lies perhaps because others do not always hear or understand what I am trying to say.

I neither lie about my gender nor attempt to deceive others yet I seem to still be caught in a web of misidentification (Snorton, 2009) when others refuse the evidentness (Goffman, 1963) of my non-binary presentation. Bettcher (2007, p. 47) argues the deployments of the gender binary other people attribute to me despite my self-identification seek to implicate me in a rhetoric of deception in such a way as to impeach my moral integrity and deny my authenticity. I am held to account not for the lies I actually tell but because my misidentification by others is attributed to me as a deliberate deception of mine. This double bind becomes particu-

larly forceful in erotic sexual encounters when a misalignment between gender presentation, sexed body and attribution meet (Bettcher, 2007) in cases of “sex by deception”.

## Sex by deception

The Gayle Newland court case was the first time I had heard of “sex by deception”, despite several other prosecutions for the same offense in the UK in recent years<sup>3</sup>. Newland’s story thus has a particular hold on me both for its novelty to me and also because I had only recently decided to be sexually active after the end of a long and generally sexless relationship. I will now briefly recap this case before continuing to consider it in relation to passing, deception and my erotic sex life<sup>4</sup>.

On 12th November, 2015 Gayle Newland, found guilty of sexual assault, was sentenced to eight years imprisonment. She won an appeal against her conviction and was released on 12th October, 2016 pending a retrial but was subsequently found guilty and sentenced to six years imprisonment on 20th July 2017. Her prosecution for sexual assault and the harsh sentence resonated through some transgender social media communities in the UK for reasons beyond mere gossip and moral approbation since her crime of “sexual assault by deception” may speak volumes about issues of passing, the lived realities of some trans and non-binary people and sex.

To be clear, Gayle did not identify as a trans-person during her trial – something that led some to state the trial was only about lesbian sexuality and had nothing to do with trans communities. I disagree as the case is about “gender deception” rather than a rather reductive understanding of lesbian and trans identities (Halberstam, 1998). Importantly for this essay Gayle may have denied being transgender in an attempt to avoid further stigmatisation and social opprobrium in court<sup>5</sup>. Her defence provided medical testimony that spoke of Gayle’s “low self-esteem [sic]”, “troubling sexuality issues” and “blurred gender lines” all “exacerbated” by other issues including “OCD”, “social anxiety disorder”, “personality disorder” and “depression” (quoted from the judge’s sentencing remarks repeated in Stewart, 2015).

In 2013 the plaintiff “X” met Kye Fortune on Facebook for the first time. Kye was Gayle’s preferred male self since the age of thirteen. X claimed she did not realise

Kye was Gayle until she subsequently “unmasked” Gayle after many months of a physical relationship. X said the use of blindfolds, masks and looking askance hid Kye’s appearance even whilst they watched TV, performed mundane things that couples do, drove in the countryside, went from one home to another and had penetrative sex at least ten times. And all of this continued for months until finally X reached up during sex to put her arm around Kye’s neck and realised:

“Something just didn’t feel right, so I sat up on the bed. Something in my mind said pull it (the blindfold) off, pull it off. I pulled it off and Gayle was standing their [sic] with a strap-on prosthetic penis. I just couldn’t believe it.” (X’s witness statement to police repeated here in Humphreys, 2015)

If the penis had been “real” sex here would have been consensual and there would be no essay: X was happy for Kye as a “real” man to fuck her. Gayle may well have regarded the prosthetic as a real embodied part of Kye (Ward, 2010). It seems that X recoded the prosthetic as a flesh and blood penis (Bettcher, 2014) in order to maintain her sense of a gendered self as a heterosexual female. This recoding literally required X to remain blind (folded) to the somatic reality of Gayle’s naked body over the many months of their physical relationship. Nonetheless what mattered was Gayle was judged to have willfully deceived X as to her gender in order to sexually assault X. Gayle was now a sex offender guilty “of three counts of assault by penetration contrary to section 2 of the Sexual Offences Act 2003” (Judge’s remarks repeated in Stewart, 2015) and sentenced to eight years in jail; a sentence described as “shocking” and “draconian” by an LGBT legal specialist (Sharpe quoted in Robson, 2015). This sentence was considerably longer than this particular trial judge had meted out to two cis-male sex offenders previously found guilty of multiple counts of paedophilia against boys and girls aged between eight and thirteen; X is the same age as Gayle and both were of legal age for consensual sex in 2013. Those cases of paedophilia with multiple victims did not however include “gender deception” and so apparently did not warrant the same harsh sentencing.

And here I return to my concerns that underlie this essay about passing and deception. If other people misattribute my gender despite my clear self-identification am I guilty of deception? Just like Gayle how obvious do I need to be? If my word, like Gayle’s, is insufficient am I guilty until I prove my innocence because of a stereotypical assumption that transgender people are presumed to be deceptive (Bettcher, 2007)? Just how do I escape a double bind?

## Who will still love me in the morning?

If I have to reveal my gender and sexual history to a prospective partner what should I say: that I lost my virginity with a girl and my anal virginity to an older man in my early teens? Would that tarnish me as promiscuous? Should I say that at school and college I told everyone I was hetero but said to boyfriends that I wasn't in denial about my sexuality and anal receptivity? Do I talk about how I tried to be cis-gender and hetero for years and even married but that my marriage broke down when I told my ex I was trans and she became abusive? All of that says I'm a liar but ignores how my deception was rooted in a fear of homophobia and transphobia, years of dysphoria and an inadequate understanding of myself – it is only relatively recently that I could describe myself as “non-binary and pansexual”.

Nowadays how many times should I explicitly mention that I am non-binary just in case a partner hasn't realised, doesn't understand or forgets? Should I ask them to sign and date a statement since I may have to prove my innocence later in court? Should I talk about the physical and sexual assaults and verbal abuse I've suffered when someone notices I'm not cis? Or mention those who think it's ok to grab at my crotch and say, “Just checking”? What of the assault where someone who knew all along that I have a penis, fucked me first and then “panicked” to leave me hospitalised? Or the cis-gender men and women, many of whom are married but proposition me because they want to “experiment”: men on the down low and women who see me as a half-way to a lesbian fantasy or perhaps as an effeminate male to be dominated? Or the tranny-chasers who sometimes claim to be trans-amorous, happy only to fuck me in private but not to hold my hand in public (Tompkins, 2011)? Just where in all of this does truth end and the lies begin? Am I the (only) one lying?

An early Saturday evening in the Spring of 2017 and I'm in a bar in town. Everyone seems to be dressed in their best, many women are in dresses, heels and makeup and men are smart casual. And there I sit in jeans, t-shirt and DMs.

“You're fascinating.” A bloke sits down opposite me. “What are you?” I stare at him, through him but don't reply. “I'm curious, you're different, fascinating. What are you? Can I buy you a drink?”

“I already have one.”



“You fascinate me. You have a dick? Yes? Are you a top?” My drink untouched I get up and leave that bar and go to another.

Later in a different bar and a different bloke: “Do you like the band? Isn’t it great to see some live music in town!” And we get to talking about music, the bands we like, the gigs we’ve been to. And I pointedly tell him I’m non-binary. He gives me a curious look and I explain what I mean. I want him to know before things go any further. I don’t want to deceive him but now I worry I’ve come on to him.

But we talk more. We’ve quite a lot in common, well at least when it comes to musical taste. We eventually leave and go back to his to talk more. And before talk turns to intimacy and sex I remind him again that I’m non-binary. He looks a little surprised but says it doesn’t matter because, “I can really go for you”. So I remind him again and he kisses and strokes me to hush me.

We go into his bedroom and I undress in front of him, watching carefully to see how he reacts when I explicitly reveal both breasts and penis to demonstrate how my self-identification aligns with the reality of my body (Bettcher, 2012) and ready to leave if he’s not cool with it or not sexually attracted to me (Bettcher, 2014). But he seems ok and we end up in bed and for the first time in many years I have sex with someone. He tries to first wank and then fellate me but I gently stop him as I’d rather he left my penis alone. He fucks me in my ass a couple of times, each time coming too quickly rather like an over eager puppy. Then whilst he cradles me in his arms I fall asleep.

Only to wake in the early dawn. As I get up he stirs, sits up, and watches me from the bed as I wander about naked with everything on display – breasts, penis, warts and all. He looks a little embarrassed, “Well, that was a first for me. I’m not gay, you know; I’m not in to blokes; I’m only interested in women. I only have sex with women. You are very female, you know, just like a woman. Prettier than some”. I sigh and repeat that I’m non-binary. He seems to have forgotten his interest last night in my penis and his fumbling attempts to touch and fellate it, me.

He tells me he wants to see me again and gives me his number. I repeat I’m non-binary. “Well yes but you pass”. A pause – rather a long pause in fact. Then, “Do you wear dresses and heels? We could go out as a couple and no-one would guess”. Is he interested in me now only because he can recode me as a woman (Bettcher, 2014) and so convince himself and his friends he’s not on the down low? Would he be interested if I didn’t “pass”? Is he interested in me as a person at all? And just

what did I want last night, a shag or the possibility of a relationship? Was I interested in him as a person or only as a cute bloke to fuck me? Why do I now feel hurt, lonely and just a little bit betrayed? In the cold morning light just why do I care? Are we lying to each other, to ourselves or perhaps both? Who is deceiving whom?

I sigh inwardly, get dressed, leaving the slip of paper on the bed to exit and walk the three miles home as yet another new dawn fades to grey.

Just what should I have done and said to him to make clear that I'm non-binary and that I do not try to pass as a woman? Is it my fault that he didn't listen, seemingly didn't understand and apparently didn't want to? Was this about lies and deception or was it more about a double bind (Bettcher, 2007) and denial? Would this relationship ever have worked or would it have quickly turned to tears if (when) he decided I led him on and "turned" him? Would he "panic" and beat seven kinds of shit out of me whilst repeating, "I'm not gay, you know", to reaffirm his heterosexuality to him and his friends; that I was a one-off; a mistake never to be repeated; just a drunken moment to deny and forget? Was this sex by deception? Could I ever prove it was not?

Who will still love me in the morning?

## Endnotes

- <sup>1</sup> In this essay I use both transgender and non-binary as umbrella terms. As Vincent (2016) makes clear the label non-binary may be considered as an umbrella term since it includes several gender identities. I remain aware of the complicated politics of inclusion and exclusion connected to such terms and in using them do not intend to occlude or deny important differences under an umbrella of inclusion and sameness.
- <sup>2</sup> I will try not to place passing, etc. in scare quotes since to do so would result in an essay positively thicketed with them. I remain very aware however of the politics that surround certain terms.
- <sup>3</sup> Sharpe, 2014 discusses two different 2013 UK prosecutions of Justine McNally and Christopher Wilson. Sharpe, 2016 discusses UK, US and Israeli prosecutions of sex by deception cases from the 1990s to 2015, including Newland and culminating with Lee in 2015.
- <sup>4</sup> My description is a confection of local, regional and national English newspaper reports of the trial and subsequent appeal. The newspaper reports referenced here were published as the trial progressed. I cite the online versions rather than the traditional print ones as the former are considerably easier to access regardless of geographical location or time.
- <sup>5</sup> I am grateful to an anonymous reviewer for this point.

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